

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 2:19-00139

DENNIS LEROY BURNS, II

O R D E R

An evidentiary hearing on the Defendant's Motion to Suppress was conducted on September 17, 2019. The court makes the following finding of facts by a preponderance of evidence and the conclusions of law that follow.

On November 12, 2018, Lieutenant Anthony Perdue of the West Virginia State Police was assisting in the search for an individual understood to be Michael McLaughlin and the still-missing State Police cruiser he was thought to have stolen the night before. Lieutenant Perdue was driving an unmarked Ford Expedition cruiser on Mud Fork Road in Boone County, about two miles from Route 119, while on his way to Lincoln County. Mud Ford Road is at that point a narrow asphalt road without a

center line and not much wider than enough to accommodate two vehicles driving in opposite directions. The officer saw the figure of a person walking on the edge of the road in the same direction he was traveling. The time was about noon and the weather was between cloudy and a light rain following a heavier rain that morning, with the temperature at 49 degrees.

As his vehicle approached, the pedestrian turned to see the vehicle and then promptly lifted his hoodie up on his head and pulled his hat bill down. The officer pulled alongside the man and stopped. The trooper, who was in uniform, rolled down the front seat passenger window and asked the man his name while the trooper remained in the driver seat of his vehicle. The man replied, "Dennis Burns."

Lieutenant Perdue immediately recognized the name as one who was being investigated by the 119 Task Force for the distribution of methamphetamine in the Boone, Lincoln and Kanawha County areas. Lieutenant Perdue was assisting the Task Force in that endeavor and had learned that Dennis Burns was one of those involved in that distribution of methamphetamine as well as one who acquired amounts of the methamphetamine being so distributed from larger dealers, and which included on occasion

the possession or trading of firearms for drugs. The officer had also been informed that Burns had been convicted of several felonies.

Upon learning his name, Trooper Perdue, knowing that Dennis Burns was not from the area where he was walking, asked Burns why he was there. He replied that he was going to visit a girl's house. This immediate exchange had taken only a matter of seconds when Lieutenant Perdue noticed that Burns, who was not visible to the trooper, through the window, below his upper arms, was shifting his arms, causing the trooper to become nervous.

For officer safety, the trooper, who was alone in a rather remote area, asked Burns in a moderate tone to "put your hands up so I can see them." Burns did so for only a couple of seconds when he dropped them and began shifting his shoulders that rotated backwards in such a way that the trooper thought he was pitching something - a bag of methamphetamine or even a firearm - with both arms, but primarily his right arm. Within three to four seconds the trooper asked Burns again to put his hands up where the trooper could see them. As Burns did so, he held a cell phone in one hand and said, "it's just a cell

phone," in the midst of which the trooper exited the driver's seat of the vehicle to see what he had tossed. At no time did the officer hear the phone ring.

The trooper immediately walked around the front of the vehicle at which point he observed at the same time both Burns who was standing there and a black firearm in a ditch two or three feet directly behind Burns. From the time the vehicle stopped and he first encountered Burns until the trooper rounded the front of the vehicle the elapsed time could be measured in a minute or two.

Once the trooper saw the firearm in the ditch, he for the first time directed Burns to place his hands up on the vehicle, proceeded to pat him down and found an empty holster on Burns' right hip. He also found a set of digital scales in Burns' pocket. Lieutenant Perdue, whose firearm remained holstered throughout, arrested Burns, handcuffed him and placed him in the cruiser where Burns was then transported by the trooper to the Madison detachment in Danville. The firearm is a Hi-Point 9mm handgun.

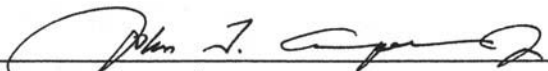
At no time prior to the arrest did the trooper tell or indicate to Burns that he was not free to leave. Nor did the cruiser's placement block Burns from continuing on his path beyond it or from readily walking around it.

The court finds that the defendant was not detained by Lieutenant Perdue until he rounded the vehicle and saw the defendant and the firearm two or three feet behind the defendant in the ditch. Until then the defendant had merely been asked to show his hands by an officer who had multiple reasons to be concerned for his safety as a single officer in a rather remote area who had encountered one whom he is informed had been convicted of several felonies and is a significant player in a methamphetamine drug ring involving on occasion firearms and who declined to show his hands for more than two seconds; and immediately after which the defendant engaged in continually moving his shoulders and arms in such a way as to indicate he was pitching something behind him before receiving his second request by the officer to put his hands where they could be seen, at which time the officer had ample reasonable suspicion that a crime is afoot and the defendant is engaging in it.

The court denies the Motion to Suppress except as to any statements by the defendant other than those noted above. As to any other statements of the defendant that the government wishes to introduce in evidence at trial, it can present those out of the presence of the Jury on the morning of trial or at such earlier time as the parties may request.

The Clerk is directed to forward copies of this order to the defendant, all counsel of record, the United States Probation Department and the United States Marshal.

DATED: October 21, 2019

  
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John T. Copenhaver, Jr.  
Senior United States District Judge